SINGAPORE REPORT

RAJAPAKSHA v. PUBLIC PROSECUTOR

[A.Cr.J. (Wee Chong Jin C.J.) June 20, 1973]
[Singapore — Magistrate's Appeal No. 159 of 1972]

Criminal Law and Procedure — Charge — Using abusive words — Minor Offences Act (Cap. 102), s. 14(f).

The appellant was convicted under the Minor Offences Act on the following charge:

"You D.E.B. Rajapaksha that you on 14.7.71 at about 10 a.m. at High Street, Singapore did use abusive words to one K.M. Oli Mohamed and that you have thereby committed an offence under section 14(f) Chapter 102, 1970 Ed".

Held, allowing the appeal: (1) the charge was bad as the essential ingredient of the charge was not contained in it;

(2) merely using abusive words is not an offence under any law so that an accused person must be charged under that particular subsection of the Minor Offences Act with either using abusive words with intent to provoke a breach of the peace or if it was a case where the abusive words were such whereby they were likely to cause provocation, those words must be in the charge.

MAGISTRATE'S APPEAL.

S. K. Isaac for the appellant.

M. P. D. Nair (on authorisation by the Public Prosecutor) for the respondent.

Wee Chong Jin C.J. (delivering oral judgment): This is quite obviously a case where no re-trial ought to be ordered; the charge is bad and the essential ingredient of the charge is not contained in it. Merely using abusive words is not an offence under any law so that an accused person must be charged under that particular subsection of the Minor Offences Act with either using abusive words with intent to provoke a breach of the peace or if it is a case where the abusive words are such whereby they are likely to cause provocation, those words must be in the charge and as had happened in this case the appellant had been convicted of using abusive words then that is not an offence known to our law.

It is said that there ought to be a re-trial. Looking at the nature of the evidence in this case and the use of the words complained of in the circumstances in which they arose it is not a fit case where a re-trial ought to be ordered and therefore the appeal is allowed, the conviction quashed and the fine to be refunded.

Appeal allowed.

Solicitors: *Ironside & de Souza; M. P. D. Nair.*

GOH LENG KWANG v. TENG SWEE LIN & ORS.

[C.A. (Wee Chong Jin C.J., Chua & Tan Ah Tah JJ.) May 28, 1974]
[Singapore — Civil Appeal No. 10 of 1973]

Practice and Procedure — Appeal — Trial judge's assessing credibility — Questions of fact — Whether Court of Appeal to disturb findings.

Land Law — Adverse possession — Action for declaration of rights of subsequent purchaser with notice — Oral testimony of witnesses — Credibility.

The plaintiff-respondents purchased two adjacent pieces of land, the first on 8.8.67 and the second on 29.12.70. On 28.8.70 the defendant-appellant made a statutory declaration asserting a squatter's title to a substantial portion of the second piece of land and a small part of the first piece of land. The defendant-appellant in his statutory declaration declared that he had been in full free and undisturbed possession and had paid no ground rent to anyone since his occupation of the land he claimed since 1953. The plaintiff-respondents had notice of the defendant's claim. They commenced an action against the defendant claiming a declaration that they were entitled to possession of the portions of land over which the defendant claimed a squatter's title. The case turned entirely on questions of fact on which there was a direct conflict of oral testimony. The trial judge accepted the evidence of the plaintiffs' witnesses and found as a fact that the defendant had trespassed in 1968 into the two pieces of land and not as he had claimed in 1953.

The defendant appealed on grounds that the trial judge erred in rejecting the evidence of the defendant and his witnesses and accepting the evidence of the plaintiffs' witnesses.

Held: (1) a Court of Appeal will not normally disturb the findings of a trial judge based on oral testimony;

(2) as the trial judge clearly considered the evidence of the witnesses and formed his opinion on their credibility or otherwise, the Court of Appeal was unable to say that on all the evidence before him and having regard to his assessment of the witnesses and evaluation of their evidence that the trial judge's crucial findings of fact were wrong;

(3) in the final analysis, it was for the trial judge to balance the probabilities and to evaluate the weight of evidence on either side and it was not for the Court of Appeal to do so.

Cases referred to:-

(1) *Khoo Sit Hoh* v. *Lim Thean Tong* [1912] A.C. 323.

(2) *Powell and Wife* v. *Streatham Manor Nursing Home* [1935] A.C. 243.

COURT OF APPEAL.

Michael Kempster Q.C. (*Harry Wee* with him) for the appellant.

A. J. Balcombe Q.C. (*Lai Kew Chai* with him) for the respondents.

Wee Chong Jin C.J. (delivering the judgment of the Court): The plaintiffs who are the respondents in this appeal, are the owners of two adjacent pieces of land known as Lot 249 and Lot 250 of Town Subdivision XXI. They had purchased Lot 250 first on 8th August 1967 and Lot 249 subsequently on 29th December 1970. Lot 249 has an area of 11,603 square feet and Lot 250 an area of 14,776 square feet. Adjoining Lots 249 and 250 but on higher ground is Lot 260 on which stands a Chinese school.

On 28th August 1970 the defendant who is the appellant, made a statutory declaration which he caused to be registered in the Registry of Deeds asserting what may conveniently be described as a squatter's title to a substantial portion of Lot 249 and a small portion of Lot 250. Annexed to the statutory declaration is a survey plan of Lots 249 and 250 in which is delineated the portions so claimed by the defendant. In his statutory declaration the defendant declares that he has been in full free and undisputed possession and has paid no ground rent to anyone since his occupation of the land he claims since the year 1953.

The plaintiffs purchased Lot 249 with notice of the defendant's claim and, after unsuccessful attempts to negotiate a settlement with the defendant, they commenced an action against the defendant claiming, *inter alia*, a declaration that they are entitled to possession of the portions of land of which the defendant asserts a squatter's title and for delivery of possession thereof. After a trial which stretched over many months and which occupied nineteen trial days, the trial judge gave

judgment for the plaintiffs. The case turned entirely on questions of fact on which there was a direct conflict of oral testimony. The judge in a considered judgment said that he accepted the three principal witnesses for the plaintiffs as witnesses of truth and believed their evidence. The judge found as a fact that the defendant had trespassed in the year 1968 into the portions of Lots 249 and 250 which he claims and not in 1953. It being common ground that the nature and contours of Lots 249 and 250 and the adjoining Lot 260 were important for the appreciation of the evidence of the witnesses and in determining the issues of fact raised at the trial, the trial judge visited the site, at the invitation of counsel, on the first day of the trial.

The defendant now appeals against the judgment of the High Court on grounds that the trial judge was wrong in rejecting the evidence of the defendant and his witnesses and in accepting the evidence of the plaintiffs's witnesses. This court is now called upon to reverse the judgment of the court below where the decision turns on questions of fact depending on the trial judge's opinion of the credibility of conflicting witnesses. In such circumstances the principles which govern an appellate tribunal are well established.

In *Khoo Sit Hoh* v. *Lim Thean Tong*[1] Lord Robson who delivered the judgment of the Judicial Committee of the Privy Council said at page 325: —

"The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordship's Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the courts who deal with later stages of the case. Moreover, in cases like the present, where those courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

In *Powell and Wife* v. *Streatham Manor Nursing Home*[2] Viscount Sankey L.C. at page 249 said: —

"It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court.... The onus is upon the appellant to satisfy the court that his appeal should be allowed..... On an appeal against a judgment after a trial before a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke* v. *Edinburgh Tramways Co. per* Lord Shaw where he says: 'When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen and heard them, and does not believe another'."

Lord Wright at page 265 said: —

"Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong': (*The Julia*), *per* Lord Kingsdown, cited with approval by Lord Summer. And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing."

We now turn to the evidence in the present case. It was common ground that Lot 260 is situate on much higher ground than Lots 249 and 250. The land slopes steeply downwards from the boundary of Lot 260 on which stands a school into these two Lots, then levels off so as to form a widish ledge running along practically the entire boundary of these two Lots, and thereafter continues to slope less steeply towards the middle of these two Lots. Up to the year 1965 there was on Lot 260 and some 20 to 30 feet from the boundary line separating Lot 260 from Lots 249 and 250 a retaining wall and this retaining wall was demolished in the process of levelling land on Lot 260 for the purpose of building a new Chinese school on the site of the former school.

The plaintiffs' case was that in January 1967, the then owners of Lot 250 and another adjacent Lot, being minded to sell, a land broker, Eu Wan Cheong, took Teng Boon Loh the husband of the 3rd plaintiff and the husband of the 2nd plaintiff to look at these two pieces of land. It was not in dispute that on Lot 250 there was a large old brick and tile building with several out-houses which were tenanted by several families. At that visit Teng Boon Loh said he saw on Lot 250 what he called "a chicken pen" on high ground, *i.e.* the ledge below Lot 260, and that part of this chicken pen stood on Lot 249. He described the chicken pen as oblong in shape with old plank walls and asbestos roof and gave its dimensions as slightly over 20 feet long, 13 to 14 feet broad and 7 to 8 feet high with two doors, one facing Lot 250 and the other facing Lot 249. He said that on higher ground on Lot 260 there was what he called "a temple" which was more or less square in shape and which faced away from Lots 249 and 250. Eu Wan Cheong, the broker, said that when he first visited the site in 1967 there was "a shed for worshipping purposes". He said this "shed was on the right hand side of the chicken pen in Lot 260 which is now the school compound". He said that in 1968 the defendant "moved the shed which was in Lot 260 to the front of the chicken pen". Teng Boon Loh and Eu Wan Cheong both said that the chicken pen belonged to and was occupied by one of the ground tenants, one Emaran, of the then owner of Lot 250 and not by the defendant. After the plaintiffs had purchased Lot 250 in August 1967 Emaran surrendered his ground tenancy on payment of compensation to him in January 1968.

The defendant gave evidence that he erected a shed on Lot 250 before 1942, vacated it during the Japanese war and returned one or two years after the war and replaced the roof and rafters. Later in 1953 he said he renovated the shed with plank walls and wooden pillars. In 1957 he again renovated the shed by erecting a V-shape gable roof. His next renovation was in 1964 or 1965, due to the fact that many worshippers were coming to the shed, by extending the length of the structure by 6 feet and the breadth by 4 feet. Up to 1963 or 1964 he was a hawker and had lived in that shed since about the year 1951. In 1963/1964 he said he became a temple medium because he was possessed of a deity or god and since then he has been a temple medium and people came to the shed to worship the deity or god which had possessed him. He also said that "the temple was erected in 1965" and to a direct question asking him when the temple was actually started his reply was "about 8 or 9 years (ago) people came to my place to consult the deity". As this evidence was given in October 1972 it would seem that he was saying that his shed became a place of worship sometime around 1963 to 1964. The last renovation was carried out in 1968 and, because of the generosity of a Mr. Tan a worshipper, the renovations were extensive.

A retired odd job labourer, Tan Gu Long, gave evidence for the defendant. He said he put up a house for the defendant in about 1952. The house he put up was 16 feet in length and 12 feet in width with wooden pillars, plank and asbestos walls and a lean-to roof. About five years later he renovated the house by putting up a gable roof, cementing the floor and replacing the old planks and asbestos sheets. He said the present temple was on the same site as the building he put up and renovated.

Another witness for the defence, Yeo Yeow Tong, a hawker and formerly a seaman, said he visited the defendant around 1954 or 1955 at a building where the present temple now is. He said in 1957 this building was different from what it was in 1954-1955 and that in 1968 there was another renovation which was carried out by a contractor. However, he also said that this building was 7-8 feet from the retaining wall on Lot 260.

Another witness, Lim Buck Seah, a school teacher and an acquaintance of the defendant, said that in 1965 when he joined Nan Chiau School the side of the defendant's temple would be about 4 feet from the retaining wall.

In 1964 a Mr. Moorthy, a surveyor attached to the Chief Surveyor's Department, was instructed to carry out a site survey of Lot 260. The survey was required because a new school was to be built on Lot 260 in place of the existing school known as Nan Chiau School. He was instructed to pick up for the Department's records any building within 10 feet of the boundary line on both sides. He said he saw only one building during his survey which so far as he could recollect was a plank and asbestos structure, 14 feet by 12½ feet, and this building was "at the junction of Lots 249 and 250 and 260". The site survey plan which was prepared from his survey of the site shows this building completely within Lots 249 and 250 and near to the boundary line with Lot 260. He described this building in the site survey plan (Exhibit D7C) as a "Plank and asbestos house". This exhibit which came from the records of the Chief Surveyor's Department was produced by Mr. Moorthy in re-examination who referred to this building in his evidence as a "hut". He gave evidence immediately after the evidence of a Mr. George Ho, an architect connected with the building of the new Nan Chiau School on Lot 260.

Mr. George Ho in his evidence referred to the same building as a "temple". He said he first went to the site about 1965. He did not say what the dimensions of the "temple" were nor did he describe it. What he did say was that he was interested to ascertain if it was worth while rebuilding a retaining wall which was originally standing on Lot 260 well within the boundary line with Lots 249 and 250 and which had been demolished in the process of levelling the land to build the new school.

Mr. George Ho said he first went to the site in 1965. He did not call for an independent survey and relied on the Government survey plan [Exhibit P15(4)] which was drawn up from Mr. Moorthy's survey. It is to be observed that both Exhibit D7C and Exhibit P15(4) show a stretch of retaining wall within Lot 260 which, according to Mr. George Ho based on Exhibit P15(4), was 20 to 30 feet from the boundary separating Lot 260 from Lots 249 and 250. It is also to be observed that Mr. George Ho never had sight of Exhibit D7C in 1965 nor during his evidence at the trial. He relied on Exhibit P15(4) to see if there were any structures within Lot 260 and said he thus assumed that the "temple" which he saw was the building coloured red in Exhibit P15(4).

It was not in dispute that when Mr. Moorthy was making a site survey of Lot 260 in late 1964 the retaining wall was still standing and that it was subsequently demolished in 1965 by a contractor who had the contract to level Lot 260. Soh Chin Chye, the son of the contractor said he saw a "temple" which was 2 to 3 feet from the retaining wall. He said the temple which he saw was different from the building shown in Exhibits P8 and P11 which are photographs taken just before the trial of the action. He said the temple he saw was not as big or as beautiful and had a different roof.

In his written judgment the trial judge found, on Mr. Moorthy's evidence, that in 1964 there was no structure between the building coloured red in the site survey plan [Exhibit P15(4)] and the retaining wall on Lot 260. The trial judge also found, in accepting Mr. George Ho's estimate of distance, that the retaining wall was 20 to 30 feet from the boundary line of Lot 260 and Lots 249 and 250. The trial judge also accepted the evidence of the defendant's witnesses Yeo Yeow Tong, Lim Buck Seah and Soh Chin Chye that in 1965 there was a shed or "temple" which was, according to Yeo Yeow Tong, 7 to 8 feet, according to Lim Buck Seah about 4 feet and according to Soh Chin Chye about 2 to 3 feet from the school retaining wall.

The trial judge also accepted the evidence of Teng Boon Loh and Eu Wan Cheong and found that in 1967 there was a shed or "temple" on Lot 260 which was on higher ground and above Emaran's chicken pen which was on Lots 249 and 250. On all these facts as

found by him, the trial judge presumed that the defendant must have erected this shed or "temple" at sometime between late 1964 and 1965 and after Mr. Moorthy had visited the site in November 1964. The trial judge also made a further finding of fact, namely that sometime in 1968 the defendant removed this shed or "temple" from Lot 260 to the front of Emaran's chicken pen and subsequently in the same year renovated or converted the chicken pen to form part of the "temple".

The trial judge in his written judgment said he was satisfied that the plaintiffs' witnesses Teng Boon Loh and Eu Wan Cheong were truthful witnesses and that he believed their evidence. On the other hand he found the defendant evasive in cross-examination, an untruthful witness whose evidence he disbelieved and rejected.

Applying the principles we have earlier referred to, for the defendant to succeed in this appeal, he has to convince us, as an appellate tribunal which has only the trial judge's notes of the evidence to work upon and has not seen or heard the witnesses, that the trial judge was wrong in his crucial findings of fact that the "temple" or "shed for worshipping purposes" was not on Lots 249 and 250 before the year 1968 but had been removed there from Lot 260 on which it had been erected sometime between late 1964 and 1965.

It is submitted on behalf of the defendant that there was independent, credible and cogent evidence in support of the defendant's oral evidence that he had erected a structure or shed before the year 1942 on Lot 250; that this structure was renovated over the years; that it was extended on to Lot 249 and was eventually transformed into the present temple now standing on Lots 249 and 250 and that there never was a building or structure which was wholly on Lot 260. It is submitted that the plaintiffs' case, in contrast, rested entirely on the oral evidence of Teng Boon Loh and Eu Wan Cheong and that on the probabilities their evidence ought not to have been preferred to that of the defendant.

The cogent, independent and credible supporting evidence relied on in the submission is the evidence of the witnesses called to support the defendant's case. The trial judge clearly, as can be seen from his written judgment, considered their evidence and formed his opinion of their credibility or otherwise with regard to the various matters on which they gave their evidence. We are quite unable to say that on all the evidence before him and having regard to his assessment of the witnesses and evaluation of their evidence that the trial judge's crucial findings of fact are wrong. Indeed, it seems to us a fair inference, from our own reading and evaluation of all the evidence and having regard to the surrounding events in the relevant area during the years 1964 and 1965, that the defendant put up a building for worshipping purposes after he became possessed of a deity and that this "temple" was erected, after Mr. Moorthy's survey, on Lot 260 between the retaining wall and the boundary line with Lots 249 and 250. It also seems to us, on all the evidence, a fair inference that as more worshippers were attracted, the defendant removed and rebuilt this "temple" on its present site and renovated and merged into the "temple" the chicken pen which originally belonged to Emaran.

Another submission on behalf of the defendant is based on a paragraph in the written judgment in which the trial judge said:

> "It is pertinent to note at the outset that the defendant produced no documentary evidence whatsoever in support of his claim (that he had been in continued undisputed possession of the land in Lots 249 and 250 and delineated blue and red in Exhibit A38 for 12 years from 1953 to 1965) except the Statutory Declaration and the court had to rely solely on oral evidence".

The submission is that the trial judge failed to take into consideration all the documents such as the survey plans, letters, etc. which were in evidence. In our judgment the trial judge was correct in his observation in that he was referring to the absence of documents, in existence between the years 1953 to 1965, to support the defendant's oral evidence that he had been in continued undisputed possession of the land claimed by him during those twelve years. There was before the court no document in existence before 1968 which directly linked the defendant with the building now on the disputed land. The first document is dated 6th February 1968 and is a letter from the Comptroller of Property Tax certifying that a house number, No. 16M Narayanan Chitty Road had been allocated to the defendant as the occupier. Thereafter there are documents which linked the defendant directly as occupying the temple now on the disputed land. In our judgment these documents clearly do not support the defendant's oral evidence that he had been in possession from 1953 of the disputed land on which he had erected a structure. These documents, in our opinion, may even support the plaintiffs' case by their being some indication inferentially that the defendant first occupied the disputed land only in 1968.

Another submission is that the trial judge failed to consider or appreciate the significance of the photogrammetric expert's evidence based on two aerial photographs taken by the R.A.F. in November 1958. The expert's evidence based on those photographs and a photogrammetric plot of the area plotted by him from the photographs is that most probably the present temple is in the same position as a building shown by the aerial photographs and the photogrammetric plot to be on Lots 249 and 250 in November 1958. We do not consider that this is by itself a sufficient reason for setting aside the judgment.

In the final analysis, it was for the trial judge to balance the probabilities and to evaluate the weight of the evidence on either side and it is not for this court to do so. The trial judge has found the two principal witnesses of the plaintiffs were truthful witnesses and believed their evidence and he has rejected the defendant's evidence having found the defendant was not a witness of truth.

In the circumstances and having regard to the issues before the trial court the defendant has failed to convince or satisfy us that the decision of the trial judge was wrong and in our judgment the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Braddell Bros.; Lee & Lee.*